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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT J. KUHN,
JOSE C. DAVILA, AND
DOYLE D. HUCKABEE,
PETITIONERS

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS' HOLDING THAT IT LACKS JURISDICTION TO CONSIDER A DOUBLE JEOPARDY APPEAL, BASED UPON THE INSUFFICIENCY OF THE EVIDENCE AT PETITIONERS' FIRST TRIAL WHICH ENDED WITH A HUNG JURY, IS IN CONFLICT WITH THIS COURT'S DECISION IN ABNEY V. UNITED STATES.

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Petitioners, Robert J. Kuhn, Jose C. Davila, and Doyle D. Huckabee, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 23, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is an unpublished Memorandum Opinion rendered February 14, 1980. A copy of the opinion is included in the Appendix as Exhibit A.

The opinion of the United States Court of Appeals for the Fifth Circuit is an unpublished per curiam opinion rendered February 23, 1981. A copy of the opinion in included in the Appendix as Exhibit B.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. A written per curiam opinion was issued by that court on February 23, 1981.

The petitioners' request for stay of the mandate in this cause pending review by certiorari to the United States Supreme Court was denied by Circuit Judge Gee on March 18, 1981. The record in this cause was then lodged with the Clerk of the United States District Court for the Western District of Texas, Austin Division. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit regardless of the status of the mandate. Carr v. Zaja, 283 U.S. 52, 53 (1931); Aetna Casualty Co. v. Flowers, 330 U.S. 464, 468 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1622:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On January 30, 1979, petitioners were indicted by a United States Grand Jury and charged with one count of conspiracy to suborn perjury in violation of 18 U.S.C. §§ 371 and 1622. Between August 28, 1979, and September 6, 1979, trial before a jury was had in the United States District Court for the Western District of Texas. At the end of the government's case-in-chief, and then again at the close of all evidence, all petitioners made motions for judgment of acquittal based on the insufficiency of the evidence against them. Each time these motions were denied. On September 8, 1979, the jury announced that it was deadlocked. The jury was then given a modified Allen charge, but later that day again announced that it was hopelessly deadlocked at six to six

as to all petitioners. The district judge at that time declared a mistrial.

On November 13, 1979, after the case was set for retrial, petitioners filed a Motion To Dismiss The Indictment For Prior Jeopardy, claiming, among other things, that the evidence produced against them at the first trial was so insufficient that their motions for acquittal should have been granted. The district court denied said motion in a Memorandum Opinion and Order on February 14, 1980. (Appendix, Exhibit A).

Petitioners timely made an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit, based upon the fact that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution barred a second trial because the evidence at the first trial was insufficient to

warrant submission to the jury.

On February 23, 1981, in an unpublished per curiam opinion, the Court of Appeals for the Fifth Circuit dismissed the appeal, holding that it was without jurisdiction to consider the issues raised. Over petitioners' objections, the mandate was returned to the District Court pursuant to Circuit Judge Gee's order entered on March 18, 1981.

REASONS FOR GRANTING THE WRIT

A. The decision below conflicts with this Court's decision in Abney v. United States in that it denies petitioners their Double Jeopardy Clause protections, by forcing them to undergo a second trial before receiving appellate review of their double jeopardy claims. This Court has clearly established

that the Double Jeopardy Clause "is a guarantee against twice being put to trial for the same offense." Abney v. United States, 431 U.S. 651, 661, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (emphasis in original). As subsequently explained in Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978), the "Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U.S. at 11. Yet the decision below fails to recognize that the full double jeopardy right is lost when one is put to trial a second time after the prosecution failed to introduce sufficient evidence to convict in the first proceeding.

The Fifth Circuit Court of Appeals

dismissed this appeal for lack of jurisdiction, citing its holding in United States v. Becton, 632 F.2d 1294 (5th Cir. 1980, motion for rehearing now pending). (A copy of the Becton opinion is reproduced in the Appendix as Exhibit C.) Becton addresses a fact situation which is procedurally identical in all respects to that in this case. In the first trial, a motion for judgment of acquittal based on insufficiency of the evidence was denied and followed by a mistrial which resulted from a hung jury. At the outset of the second trial, a motion to dismiss on grounds on former jeopardy due to the insufficiency of the evidence at the first trial was denied, and an interlocutory appeal was taken. 632 F.2d at 1295.

Significantly, the Becton Court

agrees that the insufficiency argument advanced there and in this case is a double jeopardy question.

> It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur. United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979).

632 F.2d at 1296.

The Becton Court also agreed that such appeals are to be governed by this Court's decisions in Burks v. United States, supra; Abney v. United States, supra; and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). 632 F.2d at 1295-6. However, the Court held that jurisdiction was lacking as to this type of appeal because one of the requirements set forth in Cohen was not met, to wit:

> that the decision sought to be appealed "was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'. . ." (citations omitted)

632 F.2d at 1296.

It is at this point that the Court of Appeals erred, because this Court has already definitively established in Abney that double jeopardy challenges are immediately appealable, due to the nature of the protections involved therein.

The Court of Appeals erred in classifying the question of the application of Cohen to double jeopardy appeals as one of first impression. The court below simply failed to recognize that this Court has already held in Abney that double jeopardy appeals are included within the Cohen exception to the final judgment requirement.

As this Court so clearly explained in its unanimous decision in Abney,

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that Cohen has placed beyond the confines of the final judgment rule. In the first place, there can be no doubt that such orders constitute a complete, formal and in the trial court, a final rejection of a criminal defendant's double jeopardy claim. . . . Hence, Cohen's threshold requirement of a fully consummated decision is satisfied.
>
> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged.

431 U.S. at 659.

When one concedes, as the Court of Appeals did in Becton, that this type of

claim is a true double jeopardy appeal, the above quoted excerpts from Chief Justice Burger's opinion in Abney leave no doubt that jurisdiction lies for immediate appellate review.

The logic behind this Court's decision in Abney, and the illogical result of the conflicting Becton opinion, are clear when one considers the procedural implications of these decisions. Three possible procedural situations can result when the government's evidence at the first of two criminal trials is insufficient:

Situation 1:

- Conviction at first trial
- Reversal of conviction for insufficiency
- Second trial barred (Burks v. United States, supra)

Situation 2:

- Acquittal at first trial
- Second trial barred (Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970))

Situation 3:

- Hung jury at first trial

In all three of these situations, the prosecution has had its chance to present sufficient evidence and has failed to do so. Yet the Court below has decided that double jeopardy protection will be provided to those defendants "lucky" enough to be wrongly convicted (Situation 1), but not those who have a jury which refuses to wrongly convict and hangs (Situation 3).

B. No adverse policy implications arise from a full and complete enforcement of the Double Jeopardy

Clause protections.

Policy considerations mandate reversal of the circuit court in this instance, if the Double Jeopardy Clause is to retain its significance. This Court in Abney v. United States, supra, clearly specified what is necessary to ensure protection against double jeopardy:

> These aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken even if the accused is acquitted, or if convicted, has his conviction ultimately reversed on double jeopardy grounds he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jepoardy challenge . . . must be reviewable before that subsequent exposure occurs.

431 U.S. at 662. When one balances the

fact that interlocutory appeal is the only means for those in petitioners' situation to receive these protections against the arguments advanced in the Becton decision, the only constitutional recourse is the position advanced by petitioners.

The dire results foreseen by the Becton Court should this type of appeal be allowed are completely illusory. The Becton panel asserted that should jurisdiction exist for this type of appeal, interlocutory appeals could be had from "all criminal trials in which a motion to acquit for insufficiency of evidence is made and denied." 632 F.2d at 1297. This conclusion is based on the same basic fallacy in analysis discussed previously. In the vast majority of criminal prosecutions which are disposed of with one actual trial, the suffi-

ciency of the prosecution's evidence is just "a step toward final disposition of the merits of the case," and is clearly not collateral under Abney and Cohen. Both this case and Becton however, belong to that relatively tiny class of cases where a first trial is fully litigated, ends in a mistrial, and is followed by a second, separate trial proceeding.

The other concern of the Becton court was that the appellate floodgates would open

> "if it is possible to take an interlocutory appeal by means of making a double-jeopardy claim grounded on any trial error or errors which it can be asserted should have resulted in an acquittal at the first trial - erroneous admission of a great body of severely damaging evidence, for example . . ."

632 F.2d at 1296. This argument is totally inapplicable to the question

here presented. The only jurisdictional question presented when Burks is applied to Abney and Cohen's holdings is that of evidentiary sufficiency at a former trial. Should this Court reverse the Fifth Circuit's decisions in this case and overrule Becton, such a holding would in no way affect the other types of appeals which so concern the court below.

Moreover, the result petitioners seek would cause little change or disruption at the trial court level. Present law provides adequate safeguards against frivolous double jeopardy claims which seek only to delay trial proceedings. In the Fifth Circuit, for example, if the trial court makes a written finding that an interlocutory double jeopardy appeal is "frivolous," the second trial need not be stayed during

the pendency of the interlocutory appeal. United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980, en banc).[1]

CONCLUSION

For the aforesaid reasons, petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

[1]Petitioners' appeal to the Fifth Circuit predated the Dunbar decision, but, as the trial court's lengthy Memorandum Order (Exhibit B) shows, the trial judge in this case certainly did not consider this appeal "frivolous" in any way.

Respectfully submitted,

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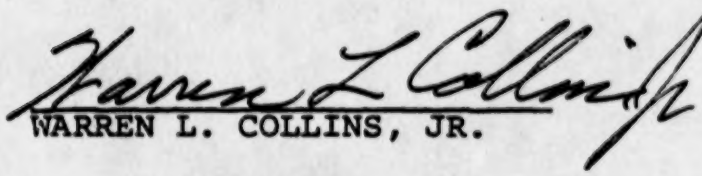
BY: 
WARREN L. COLLINS, JR.

PROOF OF SERVICE

The undersigned counsel for petitioners certifies by his signature below that three copies of the above and foregoing Petition for Writ of Certiorari

have been served on Mr. Wade Hampton McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530, by depositing same in a United States mailbox, with first-class postage prepaid, addressed as above.

Warren L. Collins, Jr.

WARREN L. COLLINS, JR.

APPENDIX

APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

NO. SA-79-CR-18

UNITED STATES OF AMERICA,

Plaintiff

VS.

ROBERT J. KUHN,
JOSE C. DAVILA, AND
DOYLE D. HUCKABEE,

Defendants

MEMORANDUM OPINION AND ORDER

On January 30, 1979, an indictment charging a conspiracy to suborn perjury in violation of 18 U.S.C. § 371, was returned against Defendants KUHN, HUCKABEE, and DAVILA. A trial in the cause was commenced on August 27, 1979, and on September 8, 1979, a mistrial was declared because of the inability of the

jury to reach a verdict.

On November 13, 1979, the Defendants, in the above-styled and numbered cause, filed a Motion to Dismiss the Indictment Due to Double Jeopardy. The basis of their Motion is that their Motion For Judgment of Acquittal urged both, at the close of the Government's case-in-chief during the first trial of this cause and at the end of the presentation of all of the evidence in the case, should have been granted. The Defendants contend that a second trial of this cause under the same indictment would violate the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States.

On February 8, 1980, the day set for oral arguments on this Motion, Defendants filed a Supplemental Memorandum in Support of their Motion to

Dismiss the Indictment Due to Double Jeopardy.

The Court, having heard oral arguments and having carefully considered the transcripts of the proceedings conducted during the first trial as well as any relevant pleadings, is ready to make a determination.

CONTENTIONS OF DEFENDANTS

In their Motion to Dismiss the Indictment Due to Double Jeopardy filed on November 13, 1979, the Defendants urged the following grounds as a basis for granting their Motion:

1. That the evidence is insufficient to support a finding of guilt in this cause as to each of the Defendants.

2. That the Government has failed to establish beyond a reasonable doubt sufficient evidence to show that the Defendants were not acting in good faith

and did not have reasonable grounds to believe the evidence they sought to obtain from Florencio H. Rendon was true.

3. That the Government has wholly failed to prove beyond a reasonable doubt that the Defendants did not have reasonable grounds to believe and were not acting in good faith as to the belief as to the true facts of the testimony given by Rendon in the 1972 trial.

4. That the Government has wholly failed to establish beyond a reasonable doubt that the change of testimony of Florencio H. Rendon was anything more than a good faith attempt on the part of an attorney, representing a client, to investigate and determine what the truth or falsity of the original testimony was.

5. That the Government has wholly failed to prove that the offense of subornation of perjury has been completed.

6. That the Government has wholly failed to establish that there would actually be a forthcoming judicial proceeding which would receive the alleged perjurious testimony for which the Defendants are indicted for conspiring to suborn.

7. That the indictment in this cause is wholly insufficient to support a finding of guilt because it fails to specify or establish the necessary elements of the offense of subornation of perjury, and therefore, is insufficient as a matter of law to support any finding of guilt.

8. That the Government has wholly failed to prove that the Defendants knew

or intended that the change in the testimony of the witness Rendon was induced or procured with the knowledge or belief of its falsity.

9. That there is a fatal variance between the indictment and the evidence in that the indictment alleges that the Defendants conspired to procure Florencio H. Rendon to give false material testimony in a case styled United States v. Frasier Jules Brignon, but the evidence indicates that the case of United States v. Frasier Jules Brignon was closed and finally adjudicated prior to the alleged commission of the present offense.

In their Supplemental Memorandum in Support of their Motion to Dismiss the Indictment Due to Double Jeopardy filed on February 8, 1980, the Defendants basically present two additional arguments. First, the Defendants contend

that they could not have conspired to commit subornation of perjury since during the entire life of the alleged conspiracy there was not a case or proceeding presently pending within which the Defendants could use the alleged suborned perjury, nor does the indictment allege, or the evidence prove, that they conspired to bring one. Secondly, Defendants contend that since there was not a case or proceeding pending, the Defendants lacked the specific intent to commit the alleged offense since the specific intent to procure another who will testify falsely cannot exist apart from the perjurer's ability or capacity to, in fact, testify.

RESPONSE OF THE GOVERNMENT

The Government's evidence in the case consists mainly of tape recordings

of conversations between the Defendants and Mr. Rendon. The Government contends that examining the evidence in a light most favorable to the Government, there is more than sufficient evidence to sustain any verdict of guilty. In support of their contention, the Government refers the Court to specific page citations of the transcript of the tapes which the Government had introduced into evidence in the first trial of this cause.

APPLICABLE LAW

In United States v. Long, 578 F.2d 579 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit set out the standard of review for denial of a Defendant's motion for a judgment of acquittal. The Court stated that on appeal:

> ". . . The denial of a judgment of acquittal will be upheld if

> the Court is satisfied that a reasonably minded jury, considering the evidence in a view most favorable to the Government, could have concluded that the evidence was consistent with guilt, and, in circumstantial evidence cases, inconsistent with every reasonable hypothesis of innocence." See also United States v. Edwards, 488 F.2d 1154, 1157 (5th Cir. 1974); United States v. Marable, 574 F.2d 224, 229 (5th Cir. 1978).

A trial judge should not permit a case to go to the jury if the evidence is so scant that the jury could only speculate or conjecture as to the defendant's guilt, and a motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of any of the essential elements of the crime charged. United States v. Lonsdale, 577 F.2d 9023 (5th Cir. 1978).

The essential elements of a con-

spiracy pursuant to 18 U.S.C. § 371 are as follows:

1. That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common end and unlawful plan, as charged in the indictment;

2. That the defendant willfully became a member of such conspiracy;

3. That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods described in the indictment; and

4. That such overt act was knowingly committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy. United States v. Romeros, 600 F.2d 1104 (5th Cir. 1979); United

States v. White, 569 F.2d 263 (5th Cir. 1978); United States v. Gutierrez, 559 F.2d 1278 (5th Cir. 1977); Fifth Circuit Pattern Jury Instructions.

The essential elements of the offense of subornation of perjury are as follows:

1. The testimony of the witness suborned must be material.

2. The testimony of the witness suborned must be false.

3. It must be given willfully and corruptly by the witness, knowing it to be false.

4. The suborner must know or believe or have good reason to believe that the testimony of the witness given, or about to be given will be false.

5. The suborner must know or believe that the witness will willfully and corruptly testify to facts which he

knows to be false.

6. The suborner must have knowingly and willfully induced or procured the witness to give such false testimony. See United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977), citing with approval Petite v. United States, 262 F.2d 788 (4th Cir. 1959), remanded on other grounds 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed. 2d 400 (1960).

ANALYSIS OF DEFENDANTS' CONTENTIONS

The Court will first discuss the arguments raised by the Defendants in their Supplemental Memorandum in Support of their Motion to Dismiss the Indictment Due to Double Jeopardy filed on February 8, 1980, since those arguments, if meritful, would preclude any further consideration of the sufficiency of the evidence to support a finding of guilt in this cause.

As stated earlier, Defendants, in their Memorandum filed February 8, 1980, present two additional arguments. First, Defendants argue that they could not have conspired to commit subornation of perjury since during the entire life of the conspiracy there was not a case or proceeding pending within which the Defendants could use the alleged suborned perjury, nor does the indictment allege or the evidence prove that Defendants conspired to bring one. Defendants start with the proposition that a conspiracy to commit a particular substantive offense requires at least that the commission of the substantive offense come within the scope of the agreement so that the agreement encompasses an agreement to commit every element of the substantive offense. Defendants assert that an essential element of the sub-

stantive offense of subornation of perjury is the existence of a case or proceeding in which the perjury was committed, and, that, hence, it is essential to a conspiracy to suborn perjury that a case or proceeding in which the perjury could be consummated be pending during the life of the conspiracy or that evidence exists that Defendants agree to bring one.

Defendants further assert that there was not a case or proceeding pending during the life of the alleged conspiracy involved in this cause. Defendants reason that in order to bring about a case or proceeding in which Mr. Rendon's perjury could be consummated, it was necessary that Frasier Brignon, the one to benefit, surrender, since his status was that of a fugitive. The Defendants contend, however, that the

Government has failed to allege in the indictment or prove in any of its evidence that any part of the alleged conspiratorial agreement involved the surrender of Frasier Brignon. Because neither the indictment alleges, nor the evidence presented at trial proves, that the scope of the alleged conspiratorial agreement involves the surrender of Frasier Brignon, a factor necessary in bringing about a case or proceeding, the conspiracy as alleged in the indictment, even if completed, could not constitute the crime of subornation of perjury.

It is true, as Defendants contend, that in order to sustain a conviction for conspiracy to commit a particular substantive offense, the commission of that substantive offense must come within the scope of the conspiracy so that the conspiratorial agreement em-

braces an agreement to commit every essential element of that offense. See United States v. Conroy, 589 F.2d 1258, 1270 (5th Cir.) reh. denied, 594 F.2d 241 (1979). It is also true, as contended by Defendants, that there was not an actual case or proceeding pending during the life of the alleged conspiracy within which the alleged suborned perjury could be consummated. However, it is the opinion of this Court, that the scope of the alleged conspiratorial agreement in this case can be found to encompass the intention that the suborned perjury be used in a case or proceeding involving Frasier Brignon. It appears to this Court that the evidence, when viewed in the light most favorable to Government is sufficient to support a finding that the Defendants agreed to suborn perjury in

an attempt to obtain a new trial for Frasier Brignon. (See the Court's subsequent discussion concerning the sufficiency of the evidence). Although the exact case or proceeding in which this testimony would be used may not have been agreed to by the conspirators, the evidence viewed in the light most favorable to the Government does support a finding that the Defendants contemplated that such testimony would be used in some Court proceeding pertaining to Frasier Brignon. (TR. p. 81, 132, 139, 192). Further, the evidence also supports an inference that the scope of the agreement would necessarily encompass the surrender of Frasier Brignon since any Court proceeding without that surrender would be useless. The fact that the exact means by which the surrender of Frasier Brignon was to be accomplish-

ed was not explicitly discussed by the conspirators does not render their agreement to suborn perjury for his benefit outside the confines of conspiracy. Further, the possibility that Frasier Brignon may decide not to surrender himself, thus making it impossible to actually use the suborned perjury in a case or proceeding, would not free Defendants from any liability for conspiracy since the scope of the alleged conspiratorial agreement encompasses the intention to use the suborned perjury in a case or proceeding involving Frasier Brignon and can be found to implicitly contemplate the surrender of Frasier Brignon, and, since impossibility of accomplishing the conspiratorial object is not a defense to a charge of conspiracy. U. S. v. Evans, 552 F.2d 455 (5th Cir. 1978); U. S. v. Winter, 509

F.2d 975 (5th Cir.) cert. denied sub. nom., Parks v. United States, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); United States v. Meyers, 529 F.2d 1033 (7th Cir. 1976).

As to the Defendants' contention that the indictment itself is defective since the indictment does not allege that any part of the alleged conspiratorial agreement involved the surrender of Frazier Brignon so that standing would exist to bring a case or proceeding in which Mr. Rendon could commit perjury, this Court notes that, unlike Defendants' contention, the surrender of Frazier Brignon is not an essential element which the Government must allege and prove (see Supplemental Memorandum in Support of Defendants' Motion to Dismiss Indictment for Prior Jeopardy, pp. 2, 3-4), in order to properly charge

the crime of conspiracy to suborn perjury. Rather, it is a detail necessary to the accomplishment of the substantive offense of subornation of perjury.

As to Defendants' contention that the indictment is deficient and that it does not allege what, if any, judicial proceeding was planned in which the alleged suborned perjury would be used, this Court notes that in a conspiracy indictment, conspiracy is the gist of the offense, and, every element of the substantive offense need not be alleged within the conspiracy count, nor is it necessary that the object of the conspiracy be described in the detail necessary in the indictment for the substantive offense. United States v. Fischetti, 450 F.2d 34 (5th Cir.), cert. denied, 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478 (1972). This Court

reaffirms its previous ruling made on November 7, 1979, after oral arguments were presented, that the indictment in the case is sufficient to charge the offense of conspiracy to suborn perjury.

Defendants' second argument presented in their Memorandum filed February 8, 1980, is to the effect that since a case or proceeding did not actually exist at any point during the alleged conspiracy, Defendants could not have the specific intent that the alleged suborner, Mr. Rendon, testified falsely. This is because the specific intent to procure another who will testify falsely cannot exist apart from the perjurer's ability or capacity to, in fact, testify.

Defendants' arguments may have some validity if Defendants were charged with the substantive offense of subornation of perjury. But Defendants are charged

with the offense of conspiracy to suborn perjury, wherein the gist of the crime is the agreement to suborn perjury. It is true, as Defendants contend, that conspiracy to commit a particular substantive offense requires at least that the commission of the substantive offense come within the scope of the agreement and that the conspiracy incorporate at least the same level and character of intent as the substantive offense. United States v. Davis, 583 F.2d 190 (5th Cir. 1978). However, as stated earlier, the evidence viewed in the light most favorable to the Government, supports a conclusion that the Defendants agree to suborn perjury and that they contemplated that the suborned perjury would be used in some Court proceeding concerning Frasier Brignon. Thus, that the suborned testimony would

be used in Court, was within the scope of the conspiratorial agreement, thus supporting the conclusion that the Defendants possessed the necessary specific intent required to commit the substantive offense.

In their Memorandum filed February 8, 1980, as well as in their Original Motion to Dismiss the Indictment Due to Double Jeopardy, the Defendants raise the general issue as to the sufficiency of the evidence to support a finding of guilt. In this regard, Defendants basically contend that the Government has failed to establish beyond a reasonable doubt sufficient evidence to show the following:

1. That the Defendants were not acting in good faith and did not have reasonable grounds to believe the evidence they sought to obtain from Rendon

was true;

2. That the Defendants did not have reasonable grounds to believe and were not acting in good faith as to the belief as to the true facts of the testimony given by Mr. Rendon in the 1972 trial; and,

3. That the Defendants knew or intended that the change in the testimony of the witness Mr. Rendon was induced or procured with the knowledge or belief of its falsity. Defendants further contend that the evidence shows a lack of agreement or concerted action to suborn perjury and that, at most, the evidence supports no more than an agreement to investigate.

Although the evidence may very well support a finding that no more was involved than an agreement to investigate, it may, when viewed in the light

most favorable to the Government, just as well support a finding that the Defendants had, in fact, agreed to suborn perjury and were attempting to work out the least suspicious manner of doing so. Although the gist of the first meeting between all three Defendants and Mr. Rendon may well indicate an investigative inquiry (see e.g. TR. pp. 51-56, 59, 63, 66, 80-81), the discussion about money and the reference to the payoff arrangements between Mr. Rendon and Defendant DAVILA would tend to favor the Government's position that more was about than just an investigative inquiry. (TR. pp. 53, 57, 61, 62, 65, 68-74, 77).

The Government's position is further strengthened by the occurrences during the second meeting between Defendants KUHN, HUCKABEE and Mr. Rendon.

the conversation starts with KUHN expressing his exasperation at not being able to figure out "any other way of doin' it. Well, they, when we walk in whatever we say they're going' to look at it. Because somebody's gonna, you know, somebody's gonna. The Justice Department, I mean, they ain't gonna just stand there, you know . . ." (TR. p. 125). A discussion then follows concerning how testimony by Mr. Rendon may be presented so that a change of testimony would not be so suspicious, (see e.g. TR. pp. 125-133) even though earlier Mr. Rendon had insisted that his prior testimony was truthful. (TR. pp. 52, 54-56). As the conversation proceeds, Defendant KUHN tells Mr. Rendon to burn any evidence that might exist which would show that Defendant KUHN and Mr. Rendon have these discussions. (TR. pp.

132, 138, 141). A discussion on how the money should be handled so as not to draw suspicion toward Rendon also follows. (TR. p. 135). Later on in the conversation, after discussing possible testimony, Defendant KUHN states that he does not want any mistakes and that if it is going to be done, it should be done right. (TR. p. 136). There is a further discussion concerning the money. (TR. pp. 140-142).

A third meeting between all three Defendants and Mr. Rendon begins with Defendant KUHN telling Mr. Rendon "they" will want you to take a polygraph or PSE test. (TR. p. 171). Defendant KUHN then states that he would like to ask Mr. Rendon the questions, record the answers, and, play the recording on Defendant KUHN's PSE machine so he can analyze the voice stress. (TR. pp. 171,

189). Defendant KUHN runs through the questions with Mr. Rendon, among which are whether or not Mr. Rendon is wearing a body bug and, whether or not Mr. Rendon had discussed the case with law enforcement people over the last two years. ((TR. p. 190-191). After hearing the questions that Defendant KUHN wishes to ask of him, Mr. Rendon replies to the effect that Defendant KUHN is trying to disprove Mr. Rendon's prior testimony. (TR. p. 192). Defendant KUHN replies, in effect, that all he is trying to do is get a reading to the answers to the questions because somewhere along the line somebody is going to ask them of Mr. Rendon. (TR. p. 192). Mr. Rendon, however, continues to object and finally leaves the room with Defendant DAVILA. (TR. p. 193). Shortly after that, the arrest of Defendants

KUHN, HUCKABEE and DAVILA is effected.

Viewing the evidence in a light most favorable to the Government, it appears that the evidence is sufficient to support a finding of guilt as to each of the Defendants. Although, as stated earlier, the gist of the first meeting may well indicate an investigative inquiry, the continual discussion concerning money and payoffs coupled with the events of the second meeting are such that a reasonably minded jury could conclude that an agreement to suborn perjury existed. Although Defendants never tell Mr. Rendon that they believe Mr. Rendon's testimony at the first trial was truthful, the conversation about covering their tracks and destroying incriminating evidence, can be taken as implicit evidence that the Defendants did in fact believe that the original

testimony by Mr. Rendon was truthful and would now have to be falsified in order to obtain a new trial. It should be pointed out that during the third meeting, Defendant KUHN again relates to Mr. Rendon his belief in the innocence of his client. However, taking the evidence as a whole, it appears that a reasonably minded jury could conclude that such a statement was made to cover himself, especially since, at that point, Defendant KUHN was obviously suspicious that Mr. Rendon was wearing a body bug. Thus, it appears to this Court, that a reasonably minded jury could very well conclude that the evidence, viewed as a whole in the light most favorable to the Government, is consistent with guilt and inconsistent with every reasonable hypothesis of innocence.

The remaining grounds urged by the Defendants, in their Motion to Dismiss Due to Double Jeopardy, are as follows:

1. That the indictment should be dismissed because the Government has wholly failed to prove that the offense of subornation of perjury has been completed;

2. That the indictment in this cause is wholly insufficient to support a finding of guilt because it fails to specify or establish the necessary elements of the offense of subornation of perjury, and, therefore, is insufficient as a matter of law to support any finding of guilt;

3. That there is a fatal variance between the indictment and the evidence in that the indictment alleges that the Defendants conspired to procure Mr. Rendon to give false material testimony

in a case styled United States v. Frasier Jules Brignon, but the evidence indicates that the case of United States v. Frasier Jules Brignon was closed and finally adjudicated prior to the alleged commission of the present offense.

As to the first remaining contention, it is well settled that success is not an essential element for a conspiracy conviction and, conspiracy is punishable even though the contemplated crime may never be consummated. United States v. Villarreal, 546 F.2d 1145 (5th Cir.), reh. denied, 55 F.2d 242, cert. denied, 431 U.S. 917, 53 L.Ed.2d 228, 97 S.Ct. 2181 (1978); Beitel v. United States, 306 F.2d 665 (5th Cir. 1962). Thus, in a conspiracy to suborn perjury indictment, the Government need not prove that the substantive offense of subornation of perjury was actually

completed by the Defendants, but only that the Defendants agreed to the commission of such an offense.

As to the Defendants' contention concerning the sufficiency of the indictment, as stated earlier, this Court has previously ruled on that issue at a separate hearing held November 7, 1979.

Finally, Defendants urge that their Motion should be granted since there is a fatal variance between the indictment and the evidence presented at the trial. It is the Defendants' contention that the indictment alleges that the Defendants conspired to procure Mr. Rendon to give false material testimony in a case styled United States v. Frasier Jules Brignon, but that the evidence indicates that the case of United States v. Frasier Jules Brignon was closed and finally adjudicated prior to the alleged commis-

sion of the present offense.

The indictment charges as follows:

> It was part of the object and purpose of said conspiracy that Defendants would induce and procure false material testimony in exchange for money from Florencio H. Rendon, a witness in United States District Court in the case of United States v. Frasier Jules Brignon.

The evidence produced at trial showed that Mr. Rendon was a witness in such a case, (TR. p. 51), and also, when viewed in the light most favorable to the Government, that Defendants contemplated that he would subsequently appear to testify in some future Court proceeding involving the same case. (TR. p. 81, 132, 139, 192).

This Court, in an earlier hearing on the sufficiency of the indictment held on November 7, 1979, expressed its concern over the uncertainty with which the indictment was drawn, especially as

to this particular clause in the indictment. (See Transcript of hearing on all pending Motions held Nov., 7, 1979, p. 59-60). Although troubled by the uncertainty as to whether the indictment charges that Mr. Rendon is, was, or will be, a witness, this Court held that the logical import of the language in the indictment, determined from a reading of the indictment as a whole, was such that the indictment was sufficient to charge a conspiracy to suborn perjury. Because the evidence shows that Mr. Rendon was a witness in the case, and, that it was contemplated that he would subsequently be a witness in the same case, this Court now finds that there was not a fatal variance between what was alleged in the indictment and the evidence produced at trial.

In light of the above discussion,

IT IS HEREBY ORDERED that the Motion of the Defendants in the above-styled and numbered cause to Dismiss the Indictment Due to Double Jeopardy be hereby DENIED.

February 17, 1980, at 5:30 p.m.

WILLIAM S. SESSIONS
United States District Judge

EXHIBIT B

UNITED STATES OF AMERICA,

Plaintiff-Appellee

VS.

ROBERT J. KUHN,
JOSE C. DAVILA, AND
DOYLE D. HUCKABEE,

Defendants-Appellants

NO. 80-1207

SUMMARY CALENDAR

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

UNIT A

FEBRUARY 23, 1981

APPEALS FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
WILLIAM S. SESSIONS, JUDGE

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion Nov. 5, 1980, 5th Cir.,
629 F.2d 1087)

BEFORE GEE, RUBIN, AND RANDALL,
CIRCUIT JUDGES

PER CURIAM:

In our original opinion, we decided the merits of this attempted Abney[1]-type appeal on the assumption that had jurisdiction to do so, expressly reserving that question. Since then it has been determined that we lack such jurisdiction. United States v. Becton, 632 F.2d 1294 (5th Cir. 1980). What we earlier wrote on the merits is therefore of no effect. We withdraw it. The appeal is DISMISSED.

FOOTNOTE:

1. Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

EXHIBIT C

UNITED STATES OF AMERICA,

Plaintiff-Appellee

VS.

MAJOR BECTON,
STANLEY BECTON,
ROBERT JONES,
ROBERT POLLACK,
VINCENT DAMIEN, AND
BARRY MIROJNICK,

Defendants-Appellants

NO. 80-1630

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

DEC. 18, 1980

BEFORE THORNBERRY, GEE AND
REAVLEY, CIRCUIT JUDGES

GEE, Circuit Judge:

This expedited appeal presents two issues, a jurisdictional one of broad interest and importance, and an evidentiary one of interest to the appellants only. Since the need for us to consider the latter depends on how we resolve the

former, we discuss it first.

Appellants' trial on drug charges resulted in a thoroughly[1] hung jury and the consequent declaration of a mistrial. Motions for judgment of acquittal at the close of the prosecution's case, renewed after the jury's discharge, were partly granted but in main denied. When the remaining counts were set for retrial, appellants renewed their motions for acquittal and further moved to dismiss on grounds of former jeopardy, asserting that the evidence produced against them at their prior trial had been insufficient to warrant submission of the case to the jury. It is the denial of these motions that they bring to us.

Appellants' argument -- and an appealing one it is -- runs that had they been convicted, and had their

convictions been reversed on appeal for insufficiency of supporting evidence, they could not have been again put to trial. This is correct. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2121, 57 L.Ed.2d 1 (1978). How then, they assert, can it be that where, as here, the evidence was so entirely insufficient as to produce a hung jury rather than a conviction, a retrial is yet permissible? When the prosecution's case is on, and the evidence is insufficient, why should a defendant be worse off if the jury hangs than if it improperly convicts? Stated as an abstract proposition, the argument by analogy seems unanswerable.

There are important differences between the case presented here, however, and the proposition stated; and the two apparent parallels are not

really parallel at all. In the case posed of a reversed conviction, we contemplate a final decision, entered in the course of appellate review, that the prosecution has had its chance to make a case for the jury and has failed to do so. Burks, cited above, stands for the proposition that after such a determination by the appellate judges, the Fifth Amendment forbids a second trial, regardless of whether the defendant sought one, just as it would have had the trial judge made the same determination, refused to submit the case to the jury, and therefore necessarily entered judgment of acquittal.

Here there has been no such determination of insufficiency by any court, trial or appellate. Instead we contemplate a contrary determination by the first trial court -- that the evidence

was sufficient to warrant submission to the jury -- and a mere refusal by the jury to convict. Such a refusal is an action in no wise the necessary equivalent of a decision, even by the jury, that the evidence is insufficient to warrant submission. In the first place, of course, the jury is neither equipped nor asked to make such a determination. In the second, it is a commonplace that juries can refuse to convict even on substantial evidence of guilt, while to the contrary judges are not to acquit unless the government has clearly failed to produce evidence supporting a conviction when viewed most favorably to the prosecution. Burks, supra at 16-17, 98 S.Ct. at 2149-2150. What the appellants seek instead, is a determination by us now -- on this interlocutory appeal before their retrial -- that the evi-

dence at the first trial was insufficient to warrant submission and that the trial judge erred in denying their motions for acquittal. This is new ground.

The procedural vehicle which brings this appeal before us is Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There the Court decided that inferior appellate courts possess jurisdiction, under the rubric of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to entertain appeals from pretrial orders denying dismissal on double-jeopardy grounds. The nub of the decision is that the Double Jeopardy Clause forbids a second trial, not merely a second conviction. In addition, however, the Court held that another claim for dismissal made in the

same motion was not reviewable, one urging insufficiency of the indictment. In so holding, the Court laid it down generally that, to be appealable under the Cohen rubric, claims for dismissal other than on double jeopardy grounds must themselves meet the requirements of the Cohen exception. Bearing the lessons of Burks and Abney in mind, we turn again to our case.

Although in form the question presented here is that of denial of a motion asserting former jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial. They argue that these should have been granted, since the evidence there was insufficient to support a jury submission, and that had they not been erroneously denied, no succeeding trial would have

been permissible. Thus we contemplate just such a "thinly disguised attempt to turn this [Abney] appeal into a plenary review of his first trial" as the Second Circuit rebuffed in United States v. Klein, 582 F.2d 186 (1978). We conclude we must do likewise.

It should be borne in mind that we do not confront the issue of reviewability; it is not an open question of this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur. United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979). Instead the issue is one of appealability: whether we have jurisdiction under Cohen and Abney to review at this time the decision denying the motions for acquittal at the first mistrial.[2] And if it is presently reviewable under Cohen, we see no appar-

ent reason why it would not have been likewise reviewable under Cohen by the giving of notice of appeal when the motion was first denied, at the close of the prosecution's case in the first trial, thus halting the trial process -- in the absence (perhaps) of a finding of frivolousness. See United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980) (en banc). Moreover, if it is possible to take an interlocutory appeal by means of making a double-jeopardy claim grounded on any trial error or errors which it can be asserted should have resulted in an acquittal at the first trial -- erroneous admission of a great body of severely damaging evidence, for example -- we view the prospect of piece-meal appeals with a vengeance. We do not believe that Cohen and Abney require such a result. At all events, we do not

believe that we should press those decisions to such lengths unless they ineluctably demand it.[3]

Among the Cohen factors, reiterated in Abney, is the requirement that the decision sought to be appealed "was not simply a 'step toward the final disposition of the merits of the case [which would] be merged in final judgment," Abney v. United States, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 2.Ed.2d 651 (1977), quoting Cohen, supra, 337 U.S. at 546, 69 S.Ct. at 1225. A motion for judgment of acquittal is no more than a motion for directed verdict. Such motions are in no sense collateral to the merits, but are precisely directed to them. They are in fact just such steps toward their final disposition as the Court concluded did not justify a Cohen appeal in its language quoted

above. In short, though the other Cohen factors are arguably present here, that discussed above is not. Cohen is a narrow exception, applicable to a "small class" of claims which meet all, not merely some, of its factors. 337 U.S. 541, at 546, 69 S.Ct. at 1225. The class which we contemplate here is not a small one. Rather, it comprises all criminal trials in which a motion to acquit for insufficiency of evidence is made and denied. One of Cohen's factors is not present here. We therefore lack jurisdiction to consider this appeal which, though in form asserting former jeopardy, in fact raises only the denial of the motion to acquit.

In view of our disposition of this issue, we need not consider at this time the sufficiency of the evidence at the first trial. The appeal is

DISMISSED.

. . . . . .

FOOTNOES:

1. To the degree of an Allen charge and three notes attesting to its deadlock.

2. No complaint is made of the declaration of a mistrial. Nor could one well be made, the jury having been hopelessly hung and the Perez standard of "manifest necessity" therefore satisfied. United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824).

3. We recognize that Wilkinson, supra, opines in dicta that the decision is interlocutorily appealable. 601 F.2d 791, at 795. That panel did not confront the issue as we do, however, and was not called

on to struggle with it as we have. We are not bound by dicta, even of our own court. Bruce v. Estelle, 536 F.2d 1051, 1059 n.5 (5th Cir. 1976), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). And though we accord it the greatest deference and persuasive force, mature consideration has convinced us that we should not follow it here. Dicta of the Supreme Court are, of course, another matter.

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No. 80-1715

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT J. KUHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to take an immediate appeal from the district court's denial of their motion to dismiss the indictment on double jeopardy grounds after the jury at their first trial was unable to reach a verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1715

ROBERT J. KUHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal (Pet. App. 36-37) is unreported. The prior opinion of the court of appeals is reported at 629 F. 2d 1087. The opinion of the district court (Pet. App. 1-35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1981. The petition for a writ of certiorari was filed on April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted and tried in the United States District Court for the Western District of Texas on one count of conspiracy to suborn perjury, in violation of 18 U.S.C. 371 and 1622. When the jury was unable to reach a verdict, the district court declared a mistrial. After the case

was set for retrial, petitioners filed a motion to dismiss the indictment and to bar retrial, claiming that the evidence presented by the government during the first trial was legally insufficient to support a finding of guilt. The district court denied the motion (Pet. App. 1-35). Following an exhaustive review of the evidence, the district court found that, "[v]iewing the evidence in a light most favorable to the Government, it appears that the evidence is sufficient to support a finding of guilt as to each of the Defendants" (Pet. App. 28).

Petitioners then filed an appeal to the court of appeals, again contending that the evidence adduced by the government during the first trial was legally insufficient. The court of appeals "assume[d] without deciding" that jurisdiction to entertain an interlocutory appeal existed (629 F. 2d 1087 (1980)). Turning to the merits of petitioners' claim, the court ruled as follows (*id.* at 1087-1088): "We have surveyed the record * * * and conclude that the judge correctly denied appellants' motion for acquittal insofar as it was based on an insufficiency of inculpatory evidence." The court added (*id.* at 1088) that the evidence was "clearly susceptible to the interpretation" that petitioners engaged in a conspiracy to suborn perjury.

Following this ruling, a different panel of the court of appeals held that there is no appellate jurisdiction under 28 U.S.C. 1291 to review an interlocutory order of a district court rejecting a claim of evidentiary insufficiency following a mistrial. *United States* v. *Becton*, 632 F. 2d 1294 (5th Cir. 1980). On the basis of the *Becton* decision, the court below withdrew its earlier opinion deciding the merits of petitioners' claim and issued an order dismissing the appeal for lack of jurisdiction (Pet. App. 36-37).

ARGUMENT

Petitioners contend (Pet. 7-14) that under *Abney* v. *United States*, 431 U.S. 651 (1977), they were entitled to

immediate appellate review of the district court's pretrial ruling denying their motion to dismiss the indictment. In their submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to sustain a conviction. In the absence of such a determination, petitioners claim, they may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). That contention is without merit.

1. In *Abney*, this Court determined that a Double Jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this Double Jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the Double Jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the merits of the controversy, and since it could not effectively be reviewed following final judgment after retrial, the Court granted immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory

basis. In particular, this Court rejected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (431 U.S. at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[1]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues" to be resolved at trial. Rather than being "collateral," the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit recently explained in *United States* v. *Rey*, 641 F. 2d 222, 225 (1980):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits

---

[1] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850 (1978); *Heike* v. *United States*, 217 U.S. 423 (1910). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

> but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F. 2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, No. 80-5069 (4th Cir. Apr. 8, 1981); *United States* v. *Becton*, 632 F. 2d 1294, 1295-1296 (5th Cir. 1980); *United States* v. *Young*, 544 F. 2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioners' appeal from the district court's ruling on the sufficiency of the evidence.

2. In any event, whatever the merits of petitioners' claim that immediate appellate review of the sufficiency of the government's evidence is required before a defendant can be retried following a hung jury,[2] this case is an inappropriate vehicle to decide the issue. Both the district court and the court of appeals expressly found that the evidence adduced at petitioners' first trial was sufficient to support a conviction (see 629 F. 2d 1087-1088). Although the court of appeals later withdrew its original decision on jurisdictional grounds, it reaffirmed that "[i]n our original opinion, we decided the merits of this attempted *Abney*-type appeal * * *" (Pet. App. 37). Accordingly, even if petitioners were to persuade this Court that the court of appeals had jurisdiction to review their claims, they would be entitled to no

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[2]In cases in which defendants successfully have appealed an initial conviction, and have claimed on remand that retrial is barred by the government's failure to adduce sufficient evidence during the original trial, two courts of appeals have granted immediate appellate review. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980).

relief. In these circumstances, a ruling on the jurisdictional issue raised by petitioners would be equivalent to an advisory opinion that could confer no practical benefit on them, but would serve only to further delay the retrial of the charge against them.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]The first trial ended in a mistrial in September 1979. The district court decided petitioners' dismissal motion in January 1980.

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